

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**CRIMINAL APPEAL No. 1874 OF 2006
with****CRIMINAL MISC. APPLICATION No.12522 OF 2006
in
CRIMINAL APPEAL No. 1874 OF 2006****For Approval and Signature:****HONOURABLE MR.JUSTICE RAVI R.TRIPATHI**

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1 Whether Reporters of Local Papers may be allowed
to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy
of the judgment ?4 Whether this case involves a substantial question
of law as to the interpretation of the
constitution of India, 1950 or any order made
thereunder ?5 Whether it is to be circulated to the civil judge
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ARVIND @ KALUBHAI MOHANBHAI LOHIA - Appellant(s)**Versus****STATE OF GUJARAT - Opponent(s)**

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Appearance :

MR DM AHUJA for the appellant.

MR.H.L. JANI, ADDL. PUBLIC PROSECUTOR for the Opponent.

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CORAM : HONOURABLE MR.JUSTICE RAVI R.TRIPATHI**Date : 20/11/2006****ORAL JUDGMENT**

The appellant-original accused in Sessions Case No.342 of 2005 is before this Court being aggrieved by judgement and order passed by the learned Additional City Sessions and Fast Track Court No.6, Ahmedabad City, dated 12th October 2006.

The accused was charged with the offence under section 363, 366 and 376 of the IPC.

2. The learned Additional Sessions Judge was pleased to convict the accused for the offence under section 366 of the Indian Penal Code ("IPC" for brevity) and award two years rigorous imprisonment, fine of Rs.500/-, in default one month's rigorous imprisonment.

3. The present appeal was filed on 7th November 2006. It was moved for admission by an urgent note dated 7th November 2006. On 10th November 2006, this Court directed the office to call for the Record & Proceedings of this case so as to reach this Court on or before 17th November 2006 and the matter was ordered to be listed today, i.e. 20th November 2006.

4. Record & Proceedings are received and the same are available in the Court room. When inquired from Mr.Ahuja, learned advocate for appellant as to whether he will like to go through the same, he replied that he himself had conducted trial and hence he is in know of every aspect of the matter.

5. The Court perused the Record & Proceedings, all necessary evidence, oral and documentary, like depositions of witnesses, are taken into consideration.

6. The case of the prosecution is that on the day of the incident, i.e. 25th December 2004 at around 2.30 PM, the accused kidnapped the victim from the lawful guardianship of her parents without their consent and took her to Rajkot. It is on 28th December 2004 that he brought the victim back. It is also the case of the prosecution that the victim was seduced with an intention to have illicit intercourse. It is also the case of the prosecution that on return the victim informed that when she was studying in Standard VII, the accused had intercourse with her. A complaint filed by the father of the

victim on 25th December 2004, for the offence under sections 363 and 366 was registered. In that complaint on the basis of the statement of the victim, offence under section 376 of IPC was added.

7. The matter was investigated by the Police Inspector, Shri Vasava. He obtained School Leaving Certificate of the victim. He took clothes of the victim in possession, recorded statements of the witnesses. He sent the clothes and samples taken for analysis to the Forensic Science Laboratory (FSL). He recorded additional statement of the victim. The victim was also sent to the Civil Hospital for physical examination. He drew Panchnamas in presence of the Panchas. After having received the report from the FSL, kept the same on record and having found sufficient evidence against the accused, filed a charge sheet against the accused in the Court of the learned Metropolitan Magistrate.

8. The learned Metropolitan Magistrate in view of the fact that the case is triable by the Court of Sessions, passed an order on 18th May 2005 and committed the case to the Sessions.

9. The learned Additional Sessions Judge taking note of the fact that the victim had shown her unwillingness to stay with her parents before the Metropolitan Magistrate, sent her to Odhav Nari Samrakshan Grih, where she was residing on the day of the judgement.

10. The learned Additional Sessions Judge after ascertaining that the accused had received papers of investigation, framed 'charge' which is at exh.2 for the offences under sections 363, 366 and 376 of IPC. The same was read over and explained to the accused, who denied to have committed any offence and prayed for trial. The trial was proceeded with. The prosecution has led oral evidence of the following witnesses:

PW No.	Exh. No.	Name
01	06	Sangeeta H. Chavda, the victim
02	07	Harish C. Chavda, father of the victim
03	12	Manjuben H.Chavda, mother of the victim
05	15	Dinesh N. Patel, Clerk of the School where the victim was studying.
06	17	Ramanbhai S. Patel, Panch of arrest Panchnama wherein the clothes of the accused were taken possession of.

PW No.	Exh. No.	Name
07	21	Kalubhai M. Chavda, Panch of the Panchnama, whereby the clothes of the victim were taken possession of.
08	27	Ramjibhai Muljibhai Motia, Panch of the Panchnama of the scene of offence.
09	32	Shakuntalaben M. Naik, Lady Constable, who was to watch the victim.
10	33	Dr.Nitin J. Dave, the doctor who examined the victim.
11	37	Khatubhai R. Dave, PSO of Naranpura Police Station.
12	39	Sangeetaben V. Rashiyani, daughter of sister of the father of the victim.
13	41	Rameshbhai Govindbhai Vala, Booking Clerk of the bus in which the victim and the accused had travelled.
14	43	Dilipbhai C. Ambalia, maternal uncle of friend of the accused.
15	44	Dilipbhai C. Chavda, uncle of the victim.
16	46	Amarsinh V. Parmar, Investigating Officer.

11. Besides the aforesaid oral evidence, the prosecution has also led the following documentary evidence:

Exhibit	Description
08	Original complaint.
09	Certified true copy of the School Leaving Certificate.
10	Certified copy of the birth certificate of the victim.

Exhibit	Description
14	Extracts of birth and death register.
16	Extracts of the school register of the victim.
18	Arrest Panchnama of the accused, which includes the details of the physical condition and taking of clothes in possession.
19 & 20	Slips of the Panch, which was taken from the clothes of the accused.
22	Panchnama of the physical condition of the victim.
23 to 26	Slips bearing signatures of the Panch found from the clothes of the victim.
28	Panchnama of the scene of offence.
29 & 30	Panchnama of the samples of the accused and the Panchnama.
34	Medical certificate of the victim.
35	Medical Certificate of the accused.
36	Medical certificate about the age of the victim.
38	Certified copy of the Station Diary.
42	Passenger ticket of the accused and the victim.
47	Report of the Charge Officer.
48	Verification report of the School Leaving Certificate of the victim.
49	Report to add section 376 of IPC.
50	Forwarding Note (FSL).
51	Receipt of FSL.
52	Covering letter of FSL.
53	Report of FSL.
54	Serology Report of FSL.
55 & 56	Letters regarding samples of the Civil Hospital.
57	Report of Nari Samrakshan Grih.
58	Application of Nari Samrakshan Grih.

12. After leading the aforesaid evidence, the learned APP, Shri Sharma filed Purshis, exh.59,

declaring that his evidence is closed. Thereafter, statement of the accused was recorded under section 313 of the Code of Criminal Procedure. After that arguments of the learned APP and Shri Ahuja, learned advocate for the defence were heard.

13. The learned Judge, after taking into consideration all the relevant material on record, oral and documentary evidence and after taking into consideration the submissions made by the learned APP and the learned advocate for the defence recorded the conviction and awarded the sentence as aforesaid.

14. Learned advocate, Mr.Ahuja for the appellant vehemently submitted that the evidence led by the prosecution regarding the age of the victim is neither trustworthy nor reliable, therefore, the learned Judge has committed an error in recording the conviction under section 363 of the IPC. He submitted that in this case three-fold evidence about the age of the victim was produced before the Court.

One was the 'birth certificate' of the victim, second

was the 'School Leaving Certificate' of the victim and the third was the 'Medical Certificate' about the age of the victim. He submitted that the learned Additional Sessions Judge has committed an error in not taking into consideration all the three evidences with regard to the age of the victim before reaching to a conclusion on the point of age of the victim. He submitted that the learned Additional Sessions Judge has committed an error in relying upon the 'Birth Certificate' of the victim. 'Birth Certificate' is at exh.10, bearing No.001147/12/04". The opening sentence of the certificate is,

"This is to certify that the following information has been taken from the original record of Birth at Ahmedabad City of Gujarat State."

The date of birth mentioned in the certificate is "06.03.1989". It bears the signature of the issuing authority, Department of Health (Birth & Death), Ahmedabad Municipal Corporation. Prima facie, there is nothing which can create doubt about the contents of this certificate. The certificate bears an

endorsement (printed one) that, 'it is certified copy'. It further bears an endorsement to the effect that it is 'Form No.9' (See Rule 9). The prosecution did not rest contented by producing this certificate. It examined Shri Madhukant Limbachia, Clerk from the 'Birth & Death Registration Office'. He was examined at exh.13 as PW-4.

15. Mr.Ahuja, learned advocate for the appellant vehemently submitted that in the cross examination, this witness has stated that,

“IT is true that no application was given for making an entry in the register about the birth”.

The learned advocate further submitted with all vehemence at his command that the witness has stated in his cross examination that, in a column of the Birth and Death Register, titled

+ as 'Hospital Statement', no details are recorded to show as to who gave the information. The learned advocate further emphasised that the witness has stated in the cross examination that for 'entry

no.891' he has not brought any statement. The learned advocate very emphatically submitted that, 'the witness has admitted that, 'he does not know, "as to when the certificate was taken by Shri Haribhai Chakubhai'; and whatever vehemence was left was pressed into service to submit that the witness has also said that 'it is true that I have never seen Haribhai or Manjulaben'.

The submissions of Mr.Ahuja, learned advocate for the appellant if analysed mean that, 'the the clerk in Birth & Death Registration Office is supposed to know every person, who comes to get a certificate or comes to get an entry made in the register.' Despite all sincere effort the Court is not able to appreciate the significance of this argument of the learned advocate. The learned is labouring under a sheer misconception that to implicate the present accused in the year 1989, the father of the victim had got the 'birth date' registered incorrectly so that on the day of the incident it can be pleaded that his daughter is minor and hence the accused is guilty of the offence alleged against him.

This is nothing but a misplaced submission and liable to be rejected outright. It is not the case of the learned advocate for the appellant that he found any interpolation in the register or that he found any over-writing in entry no.891 at page 130 of the register. In fact the learned advocate himself is not clear as to what does he want to convey by saying that, "the clerk of the Birth & Death Registration Office has not seen either father or mother of the victim." The whole argument is misconceived and hence rejected.

In absence of any submission that there is any interpolation or there is over-writing in the register, which is produced before the Court, verified by the learned Additional Sessions Judge. There is no reason for which the same can be discarded.

In fact the opening para of the deposition of the Clerk from the Birth & Death Registration Office, PW-4, Exh.13 says that, "I am serving in the Birth and Death Registration Office since 1977". It is further stated that, 'we have to discharge our duties

in different wards according to the instructions of our superior. At present I am discharging my duties at Birth & Death Registration Office situated at V.S. Hospital.' In fact all the submissions of the learned advocate with regard to this conclusive evidence are misplaced and therefore, they are rightly rejected by the learned Additional Sessions Judge and having found no substance by this Court also, the same are rejected.

16. The prosecution in addition to the aforesaid evidence also produced a certified copy of 'School Leaving Certificate' at exh.9. It is certified by 'Shri D.P. Patel, Principal of Archana High School, Naranpura, Ahmedabad -13. The certificate bears the date of birth of the victim to be '06.03.1989'. The learned advocate for the appellant made all possible submissions but without any substance. The submissions made by the learned advocate for the appellant would have found favour from the Court, if, 'the date of birth in birth certificate and the School Leaving Certificate were at variance'. In the present case, the date of birth of the victim is found to be the same, i.e. '06.03.1989'. That being

so, the submissions made by the learned advocate for the appellant that, 'the School Leaving Certificate is from a school which is not the first school in which the victim was admitted' is insignificant. The 'School Leaving Certificate' is issued by 'Archana Higher Secondary School', a judicial notice can be taken of the fact that, 'the victim was admitted to this school after she completed her primary education'. In fact it is so mentioned in the School Leaving Certificate that she took admission on 15th May 2002 after completing her primary education, i.e. upto Standard VII. She left the school on 20th June 2002. At the relevant time she was admitted in Standard VIII and that is reflected in Clause No.8 of the certificate that, 'she was studying in Standard VIII from June 2002'. Clause no.9 pertains to the 'reason for leaving the school'. There it is stated that 'on account of going elsewhere'. In this School Leaving Certificate, General Register No.1805 is mentioned and certificate is also numbered as No.1603. One Dineshkumar Naranbhai Patel is examined, who is clerk of the school, as PW-5, Exh.15. He brought the 'General Register' of the school to the Court in which at page 6 at entry no.1805 the name of the victim is found.

This too is verified by the learned Additional Sessions Judge. A xerox copy of the same is on record. This Court also perused the said xerox copy. There is neither any over-writing in the entry nor any interpolation. It is found that the page starts with entry no.1801 and ends with entry no.1807. All entries are in a natural sequence. This particular register gives further information like the victim had taken admission in the school on 15th May 2005. the name of her earlier school is "Gandhinagar Shala (School)-4, Ahmedabad" and the date of birth is mentioned in numericals as well as in words, i.e. 06.03.1989, i.e. Sixth March nineteen hundred eighty nine.

It is a matter of common knowledge, of which a judicial notice can be taken that every time when a child leaves the school, she is given a School Leaving Certificate and when child is to take admission in another school, the School Leaving Certificate issued by the earlier school is to be deposited and it remains in the custody of the later school for all time to come and it is the school in which the admission is taken issues its own

certificate, which then becomes a valid School Leaving Certificate. In the present case, the School Leaving Certificate issued by Gandhinagar Shala No.4 was deposited in Archana Higher Secondary School and it is on the basis of that School Leaving Certificate necessary entry was made in the General Register of Archana Higher Secondary School. Having once taken admission in Archana Higher Secondary School, she is entitled to get School Leaving Certificate issued by this school only, i.e. Archana Higher Secondary School. Therefore, the submission of the learned advocate Mr.Ahuja that the prosecution has not produced School Leaving Certificate of the first school in which the victim had taken admission is without any merit. It will not be wrong to say that the submission made by the learned advocate is with unnecessary vehemence. Having found no merit, the same is rejected.

17. Learned advocate Mr.Ahuja for the appellant laid much weightage on exh.36, the medical certificate of the victim. Certificate is dated 31st December 2004 from the office of the Police Surgeon , Civil Hospital, Ahmedabad. It bears E.P.R. No.10980/ 29/

04. The contents of the certificate are that,

"This is to certify that Kum.Sangita Haribhai Chavda sent by Police Yadi, Naranpura P.S. and accompanied by the Police. Her examination was done by me on dt.29.12.04 at 11.15 AM. The patient was admitted in the hospital on 28.12.04 under Dr.B.R.L. Unit and discharged on 29.12.04.

This patient following X-Ray done for bone age determination:

weight - 44 Kg.

Height - 5' 1" (f feet, 1 inch)

Teeth - 7/7, 7/7.

Advice X-Ray : (1) X-Ray Rt. Shoulder, (2) X-Ray Rt. Elbow, wrist - AP, (3) X-Ray pelvis with both hips - AP 14560R.

Finally the certificate ends by saying that, "So the approximate radiological bone age of this case from

above X-Rays is more than 17 (seventeen) years and less than 19 (nineteen) years. This X-Ray reporting done by Dr.Jasmin Shah, (Radiology Dep. Tutor in B.J. M.C. & Civil Hospital, A'bad.)" The certificate is signed by the Medical Officer, Cl.II, Civil Hospital, Ahmedabad.

18. Mr.Ahuja, learned advocate for the appellant vehemently submitted that once this Medical Certificate was on record, the learned Additional Sessions Judge ought to have ignored the aforesaid two certificates and should have acquitted the appellant for offence under section 363 of IPC. He submitted that this certificate of the doctor declaring the age of the victim to be between 17 and 19 years should have been relied upon and it should have been held by the learned Additional Sessions Judge that, 'the victim was not minor' and therefore, no offence was committed by the appellant.

19. In this regard the learned advocate Mr.Ahuja relied upon a decision of the Himachal Pradesh High Court in the matter of State of Himachal Pradesh Vs.

Shri Dharam Dass, reported in 1992 CRIMINAL LAW JOURNAL 1758. The Head Note thereof reads as under:

“(A) Penal Code (45 of 1860), S.363, S.366, S.376 - KIDNAPPING - RAPE - Kidnapping and Rape - Age of victim - Entry in birth register - Absence of evidence as to who was author when entry was made and fact of obtaining of copy of birth entry after six months of occurrence - Are suspicious circumstances - Entry of birth cannot be relied upon.”

Learned advocate Mr.Ahuja relied upon the observations made in paras 16 and 17 of the said judgement, which read as under:

“16. Another suspicious circumstance which the disputed entry in the Birth Register gives rise to is as to who was the author of the said entry. Was it the father of the prosecutrix or some-one else? There is no dispute that father had died during the childhood of the prosecutrix. Further, who gave the information to the custodian of the record, whether Chawkidar or Secretary of the Gram Panchayat regarding the birth of the prosecutrix, is also not decipherable from the evidence. There is also no other

evidence to show whether the author effecting the entry in the said register is dead or alive. Thus, the result is that one does not know who was the author, when this entry was made, when no date has been reflected in the concerned column. Thus, no weight can be attached to the said entry in view of this legal lacuna.

17. S.I. Milap Singh (P.W. 15), was the Investigating Officer at the material time. The disputed entry vide Ext. PP was procured by him during investigation on 11-6-1981 after a lapse of more than six months of the occurrence. In his statement, he has explained that the Secretary, Panchayat, Dhalli was on leave and was not available. No such fact is revealed by the case diary nor this fact is stated by P.W. 1 nor the Investigating Officer has even cared to produce the previous and subsequent entries to the entry in dispute which could have positively shown unbiased investigation on his part. In the circumstances, the learned trial Court was absolutely right in having observed that the factum of procuring the aforesaid copy of the birth entry pertaining to the prosecutrix after a lapse of six months of the occurrence, does, not rule out the possibility of the entry having been manoeuvred or at least made afterwards in the register. In any case, it does raise a

doubt of which benefit should be given to the accused."

A plain reading of paras 16 & 17 of the said judgement reveals that the facts of the present case has no resemblance with the facts of the case decided by the Himachal Pradesh High Court. In the present case, the birth certificate, exh.10 is produced and is duly proved by the evidence of Shri Madhukant Mohanbhai Limbachia, PW-4, Exh.13. As discussed hereinabove, exhibits 10 and 13 together make it very clear that the evidence is absolutely reliable and even remotely it cannot be suspected. Besides, the said date is corroborated by another set of evidence, i.e. School Leaving Certificate. It is too harsh to argue that it was in anticipation that the daughter is going to be victimised on a future date in such a case, and therefore, in advance the date of birth was so mentioned, not in one set, but in two sets of evidence with a view to rope the accused. The submission not only sounds unacceptable but irrational. Only because the learned advocate is engaged by the appellant, it does not mean that the learned advocate should argue anything leaving aside all acceptable norms.

20. Learned advocate, Mr.Ahuja next referred to the deposition of PW-3, Exh.12, Manjuben Haribhai Chavda, mother of the victim and tried to make out an issue as the date of birth is mentioned to be 06.06.1989 instead of 06.03.1989. The learned advocate lost sight of the educational background of the mother of the victim. For a person with this background, it is not easy to remember the date of birth by English Calendar. It is not expected from the mother of the victim that she will remember the date of birth in terms of English Calendar. She has stated that at the time of the incident, the age of my daughter was 15 years. That being so only because the date of birth of the victim is stated to be 06.06.1989, her entire evidence is not untrustworthy. Therefore, the submission made in this regard is also found without any substance, hence rejected.

21. The learned advocate for the appellant next relied upon a decision of the Hon'ble the Apex Court in the matter of S. Varadarajan Vs. State of Madras, reported in A.I.R. 1965 SC 942. The learned advocate very vehemently submitted that this case

squarely applies to the facts of the present case. To convince the Court he read the facts of the case. He read paras 2, 3, 4 and 5. Last but not the least he read and relied upon para 9 also in support of his submission that, 'it is not important as to what was the age of the victim, but what is important is, 'the maturity of the victim'. He also tried to show that there is resemblance in the facts of the two cases. He submitted that as in the case of S. Varadarajan (supra), in the present case also it was the girl (victim), who forced the accused to act in a manner in which he had acted and landed in trouble for the offence under section 363 of IPC. He invited attention of the Court to para 9 of the said judgement which reads as under:

“It must, however, be borne in mind that there is a distinction between “taking” and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of S.361 of the

Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian."

(emphasis supplied)

The glaring difference in the facts of the case before the Hon'ble the Apex Court and the case on hand is that, 'there, the date of birth of the girl, Savitri was November 13, 1942 and the incident had taken place on October 01, 1960'. That means, after 12 days she was completing 18 years of age. Whereas, in the case on hand, the victim was only 15

years old. Besides this, in the case before the Hon'ble the Apex Court, it is on record that, 'the girl, Savitri was a student of 2nd Year B.Sc. in Ethiraj College at Madras'. While in the present case, the girl belongs to Chamar community as mentioned in exh.9-School Leaving Certificate. Her educational background is also reflected from this certificate itself. She was admitted in Standard VIII in June 2002 and on 20th June 2002, she left the school. (emphasis supplied)

Despite best efforts, one cannot put the victim in the present case at par with 'Savitri', who was 12 days short of her age to be 18 years, and a student of 2nd Year B.Sc. In Ethiraj College, Madras.

22. Learned advocate, Mr.Ahuja next submitted that the victim, Sangeeta, who is examined as PW-1 at exh.6, was declared hostile.

After she was declared hostile she was cross examined by the learned APP; thereafter, by the learned advocate for defence. In the cross examination by

the learned advocate for defence, she has stated that her parents, her uncle and other relatives wanted her forcible engagement, against her will. She had further stated that in light of the said forcible engagement, she asked the accused to take her away; that it was not the accused who took her away, but she forced the accused to take her away. She had further stated that, 'she had told Arvind (accused) that if he does not come she will die'. She had further stated that 'it is true that she knew that what is good and what is bad; therefore, of her own she decided to go away .. '. Mr.Ahuja, learned advocate for the appellant submitted that in view of the aforesaid statements made by PW-1, the victim, the accused could not have been held guilty of the offence under section 363 of the IPC.

Section 363 of the IPC provides for punishment for kidnapping. The term, 'kidnapping' is defined in section 361 of the IPC. Section 361 of IPC reads as under:

“Kidnapping from lawful guardianship. -
Whoever takes or entices any minor under
sixteen years of age if a male, or under

eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

All the ingredients of section 361 of the IPC-kidnapping are found to have been proved by the learned Judge and therefore, the submission of the learned advocate cannot be accepted. In the result the appeal fails and is dismissed.

23. In view of the order passed in the appeal, Criminal Misc. Application No.12522 of 2006 does not survive and is disposed of accordingly.

(RAVI R. TRIPATHI, J.)

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